



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No. 75-1118

DON BENSCHOTER,

Appellant,

vs.

THE FIRST NATIONAL BANK OF LAWRENCE and
KUHN TRUCK AND TRACTOR COMPANY, INC.,

Appellees.

On Appeal From The Supreme Court of Kansas

MOTION TO DISMISS OR AFFIRM

Gerald L. Cooley
ALLEN & COOLEY
201 First National Bank Tower
900 Massachusetts Street
Lawrence, Kansas 66044
913 843-0222
Attorneys for Appellee Kuhn Truck
and Tractor Company, Inc.

TABLE OF CONTENTS

| | |
|---------------------------------|---|
| Statement of the Case | 2 |
| The Statute | 2 |
| Argument | 2 |
| Conclusion | 3 |

TABLE OF CITATIONS

CASES

| | |
|---|---|
| <u>Adams v. Southern California First National Bank</u> , 492 F.2d 324 (9th Cir. 1974), cert. denied, 419 U.S. 1006 | 2 |
| <u>Bichel Optical Lab, Inc., v. Marquette National Bank of Minneapolis</u> , 487 F.2d 906 (8th Cir. 1973) | 3 |
| <u>Brown v. United States National Bank of Oregon</u> , 509 P.2d 442 (Ore. 1973) | 3 |
| <u>Emmons v. Easter</u> , 62 Mich. App. 226, 233 N.W.2d 239 (1975) | 3 |
| <u>Fuentes v. Shevin</u> , 407 U.S. 67 (1972) | 3 |
| <u>Gibbs v. Titelman</u> , 502 F.2d 1107 (3rd Cir. 1974), cert. denied 419 U.S. 1039 | 2 |
| <u>Johnson v. Associates Finance, Inc.</u> , 365 F.Supp. 1380 (S.D. Ill. 1973) | 3 |
| <u>Kirksey v. Theilig</u> , 351 F.Supp. 727 (D.C. Colo. 1972) | 3 |
| <u>Messenger v. Sandy Motors, Inc.</u> , 121 N.J. Super. 1, 195 A.2d 402, 405 (1972) | 3 |
| <u>Northside Motors of Florida, Inc. v. Brinkley</u> , 282 So.2d 617 (Fla. 1973) | 3 |

| | |
|---|---|
| <u>Nowlin v. Professional Auto Sales, Inc.</u> , 496 F.2d 16 (8th Cir. 1974), cert. denied, 419 U.S. 1006 | 2 |
| <u>Pease v. Havelock National Bank</u> , 351 F.Supp. 118 (D.C. Neb. 1972) | 3 |
| <u>Shelby v. Kreamer</u> , 334 U.S. 1 | 2 |
| <u>Sniadach v. Family Finance Corporation</u> , 395 U.S. 337 (1969) | 3 |
| <u>Turner v. Impala Motors</u> , 503 F.2d 607 (6th Cir. 1974) | 3 |

STATUTE

| | |
|---------------------------|---|
| K.S.A. 84-9-503 | 2 |
|---------------------------|---|

In The

Supreme Court of the United States

October Term, 1975

No. 75-1118

DON BENSCHOTER,

Appellant,

vs.

THE FIRST NATIONAL BANK OF LAWRENCE and
KUHN TRUCK AND TRACTOR COMPANY, INC.

Appellees.

On Appeal From The Supreme Court of Kansas

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States the appellee, Kuhn Truck and Tractor Company, Inc., moves the court to dismiss the appeal herein taken from the decision of the Supreme Court of Kansas on the ground that it does not present a substantial federal question. Further, this appellee moves that the appeal herein be dismissed or, in the alternative, that the decision of the Supreme Court of Kansas, be affirmed on the ground that the overwhelming weight of state and federal decisions involving the issues on appeal are supportive of this appellee's motion and no further argument thereon should be entertained.

I.
STATEMENT OF THE CASE

The sole question presented by the appellant in this appeal is whether the "self-help" provision of the Kansas Uniform Commercial Code, K.S.A. 84-9-503, the text of which is set forth on page 2 of appellant's jurisdictional statement, is violative of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

II.
ARGUMENT

The due process clause of the Fourteenth Amendment of the United States Constitution provides that no state shall deprive any person of life, liberty or property, without due process of law. To invoke the provisions of this clause, there must be established requisite state action, as the conduct of private individuals is outside of and not controlled by the Fourteenth Amendment, Shelby v. Kreamer, 334 U.S. 1, 13, 92 L.Ed. 1161, 68 S.Ct. 836.

The case at bar involves the "self-help" repossession of security by a secured creditor from a defaulting debtor without the creditor invoking the aid or assistance of the courts or any officer thereof (see pages 3 and 4 and appendices "A" and "C" of appellant's jurisdictional statement). The Federal Circuit Courts have consistently held that the requisite state action is not present in ordinary "self-help" repossession cases such as the one at bar. Gibbs v. Titelman, 502 F.2d 1107 (3rd Cir. 1974), cert. denied 419 U.S. 1039, 42 L.Ed.2d 316, 95 S.Ct. 526; Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16 (8th Cir. 1974), cert. denied, 419 U.S. 1006, 42 L.Ed.2d 283, 95 S.Ct. 328; Adams v. Southern California First National Bank, 492 F.2d 324 (9th Cir. 1974), cert. denied, 419 U.S. 1006, 42 L.Ed.2d 282, 95 S.Ct. 325.

This court was called upon to grant certiorari in the Gibbs, Nowlin and Adams cases, supra, wherein

the same due process arguments were urged upon the court as are present in the instant case. However, this court in each case denied certiorari thus sustaining the abundance of state and federal court cases which have upheld the constitutionality of Section 9-503 of the Uniform Commercial Code. See: Brown v. United States National Bank of Oregon, 509 P.2d 442 (Ore. 1973); Messenger v. Sandy Motors, Inc., 121 N.J. Super. 1, 195 A.2d 402, 405 (1972); Pease v. Havelock National Bank, 351 F.Supp. 118 (D.C. Neb., 1972); Kirksey v. Theilig, 351 F.Supp. 727 (D.C. Colo. 1972); Bichel Optical Lab, Inc., v. Marquette National Bank of Minneapolis, 487 F.2d 908 (8th Cir. 1973); Turner v. Impala Motors, 503 F.2d 607 (6th Cir. 1974); Johnson v. Associates Finance, Inc., 365 F.Supp. 1380 (S.D. Ill. 1973); Northside Motors of Florida, Inc., v. Brinkley, 282 So.2d 617 (Fla. 1973); Emmons v. Easter, 62 Mich. App. 226, 233 N.W.2d 239 (1975).

Appellant, at page 5 of his jurisdictional statement, has cited Sniadach v. Family Finance Corporation, 395 U.S. 337 (1969), and Fuentes v. Shevin, 407 U.S. 67 (1972), in his attempt to have this case set for argument. These authorities are not germane to appellant's case because the court in each instance found sufficient "State" or "Governmental Action" so as to invoke the due process guarantees. In this case, and the many others concerning "self-help" repossession which have been previously cited, there is not, nor was there, an involvement of "State Action" sufficient to invoke the provision of the due process clause. One can only imagine the utter chaos that might befall all levels of the judicial system if every act of the private individual was required to be presented for judicial scrutiny on the issue of a failure of due process requirements.

III. CONCLUSION

The appellee, Kuhn Truck and Tractor Company, Inc., respectfully submits that this appeal should

be dismissed for the reason that it does not present a substantial federal question. Further, this appellee submits that this appeal should be dismissed or, in the alternative, the decision of the Supreme Court of the State of Kansas should be affirmed on the ground that the overwhelming weight of prior federal and state court decisions concerning the issue on appeal are supportive of this appellee's motion and that no further argument of the point is necessary.

Respectfully submitted,

GERALD L. COOLEY
ALLEN & COOLEY
201 First National Bank Tower
900 Massachusetts Street
Lawrence, Kansas 66044
Attorneys for Appellee, Kuhn Truck
and Tractor Company, Inc.